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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 WEYERHAEUSER COMPANY,

11 Plaintiff,

12 v.

13 NOVAE SYNDICATE 2007, et al.,

14 Defendants.

CASE NO. C18-0585JLR

ORDER TO SHOW CAUSE WHY
THIS CASE SHOULD NOT BE
DISMISSED AS
NONJUSTICIABLE

15 Plaintiff Weyerhaeuser Company (“Weyerhaeuser”) seeks a judgment under the
16 Declaratory Judgment Act, 28 U.S.C. § 2201, that Weyerhaeuser is not required to
17 arbitrate any coverage dispute that may arise under the excess liability policies it
18 purchased from Defendants Novae Syndicate 2007, Apollo Liability Consortium 9984,
19 ANV Casualty Consortium 9148, SCOR UK Company Ltd., Starstone Syndicate 1301,
20 Hiscox Dedicated Corporate Member Limited as representative member of Syndicate 33
21 at Lloyd’s, and Starr Underwriting Agents Ltd. (collectively, “Defendants”). (*See*
22 *generally* Compl. (Dkt. # 1).) For the reasons discussed below, the court ORDERS the

1 parties to show cause, within seven days of the filing date of this order, why this action
2 should not be dismissed as nonjusticiable.

3 The concept of justiciability “expresses the jurisdictional limitations imposed upon
4 federal courts by the ‘case or controversy’ requirement” of Article III of the United States
5 Constitution. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) (citation
6 omitted); U.S. Const., art. III, § 2. Justiciability is a threshold matter that courts have an
7 independent obligation to evaluate, *sua sponte*, if necessary, before reaching the merits of
8 a case. *See, e.g., Am. Civil Liberties Union of Nev. v. Lomax*, 471 F.3d 1010, 1015 (9th
9 Cir. 2006); *see also Toumajian v. Frailey*, 135 F. 3d 648, 652 (9th Cir. 1998) (“In this
10 action, as in all actions before a federal court, the necessary and constitutional predicate
11 for any decision is a determination that the court has jurisdiction—that is[,] the power—
12 to adjudicate the dispute.”).

13 The Declaratory Judgment Act provides, in relevant part, that, “[i]n a case of
14 actual controversy within its jurisdiction, . . . any court of the United States . . . may
15 declare the rights and other legal relations of any interested party seeking such
16 declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).
17 The phrase “case of actual controversy” refers to the types of cases and controversies that
18 are justiciable under Article III of the Constitution. *See MedImmune, Inc. v. Genentech,*
19 *Inc.*, 549 U.S. 118, 126-27 (2007). An actual controversy exists within the meaning of
20 the Declaratory Judgment Act when the dispute is “definite and concrete, touching the
21 legal relations of parties having adverse legal interests.” *Id.* at 127 (quoting *Aetna Life*
22 *Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). Further, the dispute must be “real

1 and substantial and admit of specific relief through a decree of a conclusive character, as
2 distinguished from an opinion advising what the law would be upon a hypothetical set of
3 facts.” *Id.* (internal quotation marks omitted). The basic question in each case is
4 “whether the facts alleged, under all the circumstances, show that there is a substantial
5 controversy, between parties having adverse legal interests, of sufficient immediacy and
6 reality to warrant the issuance of a declaratory judgment.” *Id.* (quoting *Md. Cas. Co. v.*
7 *Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Even where the Article III requirement
8 of an actual controversy is satisfied, the district court’s exercise of its declaratory
9 judgment authority is discretionary. *See Gov’t Emps. Ins. Co. v. Dizol*, 133 F.3d 1220,
10 1222-23 (9th Cir. 1998).

11 Here, Weyerhaeuser seeks a declaratory judgment that it need not arbitrate any
12 dispute over excess liability coverage that may arise between it and Defendants. (Compl.
13 ¶¶ 1, 35-37.) Weyerhaeuser acknowledges that “[a] justiciable controversy does not yet
14 exist between the parties regarding coverage.” (*Id.* ¶ 1.) Rather, the parties dispute “the
15 arbitrability of coverage disputes under the subject policies.” (*Id.*) Specifically,
16 Weyerhaeuser claims that Defendants’ excess liability policies require Defendants to
17 litigate any coverage dispute in a court of Weyerhaeuser’s choosing in the United States.
18 (*Id.* ¶¶ 26-31, 37.) Weyerhaeuser further represents that it “has incurred, or expects to
19 incur, covered defense costs and liabilities in connection with [an allegedly defective
20 Weyerhaeuser product] that exceed the applicable coverage limits of all of [Defendants’]
21 [p]olicies.” (*Id.* ¶ 22.) According to Weyerhaeuser, “Defendants have neither confirmed
22 that resolution of future disputes, should they arise, will occur in a Washington State

1 forum nor disclaimed any intention to initiate a competing coverage arbitration and/or
2 litigation outside of Washington.” (*Id.* ¶ 24.) Weyerhaeuser thus contends that “[t]here
3 is an actual and justiciable controversy between Plaintiff and Defendants as to the
4 arbitrability of the parties’ disputes regarding or arising under [Defendants’] [p]olicies
5 and the proper venue for any such litigation.” (*Id.* ¶ 37.)

6 Upon its own review of the pleadings and applicable law, the court is not
7 convinced that this action presents an “actual controversy” within the meaning of the
8 Declaratory Judgment Act. *See* 28 U.S.C. § 2201(a). Defendants have not initiated or
9 sought to compel arbitration, and Weyerhaeuser expressly concedes that no coverage
10 dispute has arisen between the parties.¹ (Compl. ¶¶ 1, 38.) Weyerhaeuser alleges only
11 that the parties disagree about the meaning of policy terms that have yet to be implicated
12 in a live dispute. In short, Weyerhaeuser appears to seek an advisory opinion on a
13 contract interpretation issue that, at this time, is untethered to a “definite and concrete”
14 controversy between the parties. *See MedImmune*, 549 U.S. at 127.

15 Indeed, several courts have concluded that a declaratory judgment action
16 concerning the arbitrability of a future, hypothetical conflict is nonjusticiable. *See, e.g.,*
17 *Jones v. Sears Roebuck & Co.*, 301 F. App’x 276, 281-84 (4th Cir. 2008) (upholding the
18 dismissal of claims as nonjusticiable where the plaintiffs alleged that the arbitration

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20 ¹ Likewise, Weyerhaeuser states in the complaint that it “does not currently allege causes
21 of action for breach of contract, bad faith, violation of the Washington Insurance Fair Conduct
22 Act, [or] violation of the Washington Consumer Protection Act” (Compl. ¶ 38.)
Weyerhaeuser reserved the right to amend its complaint “to add such causes of action” should a
coverage dispute arise. (*Id.*; *see also id.* ¶ 1.) To date, Weyerhaeuser has not sought to amend its
complaint. (*See generally* Dkt.)

1 provision of a credit card agreement was unconscionable, because “none of the
2 [d]efendants has threatened to invoke the arbitration provision”); *Lee v. Am. Express*
3 *Travel Related Servs.*, No. C 07-04765, 2007 WL 4287557, at *5 (N.D. Cal. Dec. 6,
4 2007) (dismissing as nonjusticiable the plaintiffs’ claim that the arbitration clause in a
5 credit card contract was unlawful, where the arbitration clause had “not been implicated
6 in any actual dispute between the parties”); *Posern v. Prudential Secs., Inc.*, No. C-03-
7 0507SC, 2004 WL 771399, at *8 (N.D. Cal. Feb. 18, 2004) (dismissing a claim for a
8 declaratory judgment invalidating an arbitration provision, where, because the defendant
9 “has not filed a motion to compel arbitration, the declaratory relief that [the plaintiffs]
10 seek[] appears speculative”); *Rivera v. Salomon Smith Barney Inc.*, No. 01 Civ.
11 9282(RWS), 2002 WL 31106418, at *2-4 (S.D.N.Y. Sept. 20, 2002) (dismissing an
12 action as nonjusticiable where the plaintiff sought a declaratory judgment to determine
13 whether potential, future claims against her former employer were subject to mandatory
14 arbitration); *Tamplenizza v. Josephthal & Co.*, 32 F. Supp. 2d 702, 704 (S.D.N.Y. 1999)
15 (finding that the plaintiff’s request for a declaratory judgment that an arbitration
16 agreement was null and void “strains the concept of ‘case or controversy’ to its outer
17 limit,” absent an actual dispute between the parties).

18 For the foregoing reasons, the court ORDERS the parties to show cause, within
19 seven days of the filing date of this order, why this action should not be dismissed as

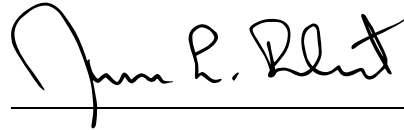
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1 nonjusticiable. The parties' responses to this order may not exceed 10 pages. Defendants
2 must jointly file one submission.

3 Dated this 22nd day of July, 2019.

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6 The Honorable James L. Robart
7 U.S. District Court Judge
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